U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
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Review of the Commission's Regulations Governing Programming Practices of Broadcast Television Networks and Affiliates	)	MM Docket No. 95-92
	)	DOCKET FILE COPY ORIGINAL
47 C.F.R. § 73.658(a), (b), (d), (e) and (g)	)	

Comments of the Chief Counsel for Advocacy
of the United States Small Business Administration
on the Notice of Proposed Rulemaking

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I. *Introduction*

On July 13, 1995, the Federal Communications Commission (FCC or Commission) issued the instant notice of proposed rulemaking (hereinafter NPRM) on modifying or eliminating regulations it adopted to regulate the relationship between broadcast television networks and their local affiliates. The changes would enable the networks to operate more freely in obtaining carriage and other agreements with their affiliates.

The Commission, pursuant to the Regulatory Flexibility Act, 5 U.S.C. §§ 601-12 (RFA), recognized that the proposed modification or elimination of the broadcast affiliate standards could have a significant economic impact on a substantial number of small entities. As a result, the Commission prepared an initial regulatory flexibility analysis and thoroughly examined a variety of alternatives in the NPRM.

The Office of Advocacy commends the Commission for its usual thorough job of analyzing various alternatives to its proposal. However, the Office of Advocacy does not believe that the FCC has demonstrated sufficient reason for eliminating the regulations. Therefore, the Office of Advocacy recommends that the Commission maintain these rules in order to prevent the networks from further dominating their relationship with affiliates.

II. *Networks*

Since the inception of radio broadcasting in the 1920's, the provision of programming has been dominated by networks. The Commission adopted regulations to retard the power of radio networks[1] and shortly thereafter, television networks.[2]

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[1] The Commission was reacting to the control of one network's broadcast of the 1939 World Series in which some communities without a network outlet were unable to hear the Series. For those who missed the results, the New York Yankees, led by the Yankee Clipper -- Joe Dimaggio, defeated the Bucky Walters and Frank McCormick led Cincinnati Reds in four straight games. Nearly sixty years later, sports fans were irate that many of them could not see the Seattle Mariners battle the Cleveland Indians for the pennant but instead had to watch the Reds go down to ignominious defeat at the hands of the Atlanta Braves.

[2] Television networks are defined as any entity which produces at least 15 hours of prime-time programming and through

(continued...)

The power of networks during the early years of television was dramatic. Networks not only provided nearly the entire day's worth of programming to affiliates but also produced many of the entertainment programs seen on the networks. This unbridled control of television broadcasting enabled ABC, CBS, and NBC to dominate television to the extent that viewership of the networks exceeded 90%.

The Commission recognized that its network affiliate rules were not providing sufficient program diversity to the American public. In 1970, the Commission instituted two rules -- financial interest/syndication (fin/syn) and the prime time access (PTAR)[3] designed to reduce the power of networks. As the Office of Advocacy has noted elsewhere, both of these rules succeeded in creating a healthy video production programming sector independent of the three networks.[4] Other changes in the economy and technology, such as the growth of independent television stations, the advent of cable television, and the

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[2](...continued) the use of affiliated stations reach 75% of the nation's television households. 47 C.F.R. § 73.662(f). Emerging networks, a category first utilized for the Fox Network and now also used by the WB and UPN networks, either do not meet the 75% standard or the 15 hours of programming per week standard. *Id.* at § 73.662(g).

[3] Within the past four years, the Commission has voted to repeal both rules.

[4] Review of the Prime Time Access Rule, Section 73.658(k) of the Commission's Rules, MM Docket No. 94-122, Notice of Proposed Rulemaking, Comments of the Chief Counsel for Advocacy at 8-11 (March 6, 1995).

introduction of the videocassette recorder, all played a role in reducing the dominance of the networks. Even the Commission cannot gainsay the dramatic increase in programming diversity during the last quarter century.

The Commission, during the past five years, has become increasingly concerned with the reduction in viewership by the networks. In other words, the Commission's efforts to reduce the power of networks has succeeded in such a spectacular fashion that the Commission wants to eliminate many of the rules that hampered the networks so that they are better able to compete in the video marketplace. In essence, the Commission has taken a 180 degree turn and now seeks to eliminate the rules so that the networks can reobtain the power that the Commission wanted to eliminate in the first instance.

The Commission, once the bane of the networks, has become their grandest champion. The Commission has eliminated the PTAR (which prohibited network affiliates in the top 50 markets from airing syndicated programming that had originally been broadcast on the networks), the fin/syn rules (which prohibited the networks from producing and syndicating television programming), the prohibition on network ownership of cable operators (which could dramatically eliminate the need for affiliates to transmit network programming), increased the number of network owned and operated stations from 6 to 12, and reduced the vitality of the rules allowing networks to acquire less-than-controlling interests in network affiliates (other than those actually owned and operated by the networks). To further assist the "now helpless networks" regain their competitive footing, the Commission has proposed to repeal the regulations that: 1) prevent the networks from controlling affiliates' advertising rates; 2) inhibit the networks from representing affiliates in the sale of advertising; and 3) require the networks to file their affiliate contracts with the Commission (which acts as a barrier to the networks entering into certain preferential deals with selected affiliates).[5]

The Office of Advocacy does not dispute that the Commission should not reexamine its regulation of networks when market and technological conditions warrant. However, the efforts by the Commission seem more intent on simply deregulating the networks than achieving statutory goals of protecting the public interest, promoting the health of local broadcasting, and enhancing program diversity. If these ends can be met by repealing the requirements covering network/affiliate relations, then the

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[5] The Commission in various proceedings, including this one, has noted that the rise of group ownership of television stations may reduce the bargaining power of networks. NPRM at ¶ 16. To be sure, a group owner may have a better chance of negotiating a favorable deal with a network but that would place the group owner in a better position in comparison to non-grouped owned network affiliates. By mandating disclosure of network affiliate contracts, individual stations or stations owned by small groups have sufficient information to question why they did not get a similar deal from the network.

Office of Advocacy would support modification or repeal. Closer analysis reveals the contrary; the NPRM will not satisfy these statutory goals and will impose even greater harm on small businesses that own television stations.[6]

III. *Network/Affiliate Regulations*

In the NPRM, the Commission proposes to eliminate or modify five longstanding regulations governing the relationship between a network and its affiliates. The "right to reject" rule prohibits a network from preventing or otherwise obstructing an affiliate from rejecting or refusing to broadcast a program which the station believes to be unsatisfactory, unsuitable, contrary to the public interest or substituting a more relevant local program, irrespective of its source. The "option time" rule debars a network from optioning an affiliate's time, i.e., reserving time on the affiliate subject to network control that the network can change on short notice. The "exclusive affiliation" rule enables affiliates to broadcast programming of other networks. The "territorial exclusivity" rule has two prongs: 1) it prevents a network affiliate from entering an agreement with the network to prevent network broadcast with a station not affiliated with the network if the affiliate rejected

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[6] The Small Business Administration defines a small television station as one with less than $7 million in gross revenue per year. The majority of the 1,500 commercial television stations in the United States would be classified as small.

the specific program; and 2) the affiliate and network cannot enter into an agreement which prevents a station in another community from airing the network's programs. Finally, the "dual network" rule prevents a network from creating or owning another network.

IV. *The Right-to-Reject Rule*

Congress imposed requirements that Commission issue a license to a television station only if it meets the public interest, convenience, and necessity. The license holder, not a network, is charged with the responsibility for operating the station to serve the public interest and the licensee, not the network, will lose the license if it fails to meet that standard.[7] The "right to reject" rule ensures that licensees maintain control over the programming selected for broadcast in order to meet the standards of public interest, convenience, and necessity.[8]

Currently, there are no conditions imposed on the "right to reject" rule. The Commission proposes to modify the rule by allowing rejection so long as it is not done for financial

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[7] Columbia Bdcstg Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 117 (1973); FCC v. Pottsville Bdcstg Co., 309 U.S. 134, 134 (1939).

[8] Muir v. Alabama Educ. Television Comm'n, 688 F.2d 1033, 1040 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1023 (1983).

reasons.[9] Thus, an affiliate would be permitted to reject the show because it did not meet community standards (a situation that has occurred with shows such as "All in the Family" and "NYPD Blue") or another program has greater local public significance (such as the local Washington, DC ABC affiliate replacing a network crime show "The Marshall" with the "Redskins Roundup"). The affiliate would not be able to replace "The Marshall" simply to get higher ratings.

The Commission does not specify what standards it would use in determining whether a program was rejected for financial or other reasons. More significantly, a program with greater local public interest also may generate higher ratings. Will the Commission have to resort to the use of Ockham's razor to determine whether the decision was grounded in public interest or financial self-interest? What information would the affiliate have to accumulate to demonstrate that it did not reject for financial reasons, i.e., the affiliate would have to prove a negative? What costs would be imposed on an already overburdened Commission staff, the local affiliates, and the networks in litigating whether the rejection was appropriate? These

[9] An affiliate may have strong economic reasons for rejecting a particular network program. If that program is very low-rated and is in the 10-11 o'clock time slot, it may affect the affiliate's ratings for its local news broadcast, reducing potential advertising revenue (local news shows are extremely profitable to network affiliate stations). Therefore, a network affiliate may seek to replace the network program with one that is likely to garner a higher rating in that time slot leading to the local news show.

questions are not answered by the Commission and the proposal, rather than reducing burdens on small television stations, would increase them while reducing burdens on large networks. Such a regulatory result turns the prophylactic purposes of the RFA on its head.

Nor can the Commission cite any grievous problem of economic rejection of network programming by affiliates. In fact, network clearances of their programming have increased during the past 15 years despite the fact that viewers have greater options in selecting alternatives than they did 15 years ago. The most logical rationale for this conclusion is that affiliates face stiffer competition for programming and believe that their network programming represents the most cost-efficient method of filling their prime-time schedules.

The Commission has presented no evidence which would substantiate the need for modifying the "right to reject" rule. The option limned in the Commission's study would not deter affiliates from rejecting network programming; it simply would enmesh networks and their affiliates in a Serbonian Bog of administrative litigation -- a result beneficial to no one.

V. *The Option Time Rule*

The Commission proposes either to eliminate the "option time" rule or modify it. The Commission's proposed modification would authorize networks to option time but require that networks give their affiliates sufficient notice to find replacement programming. The Commission reasons that elimination of this rule will make it easier for new networks to start and current networks to obtain time for showing of controversial programs. The Office of Advocacy finds the Commission's reasoning without support and demonstrates a considerable lack of understanding in how programming is obtained by television stations.

The Commission has no evidence that either new networks have difficulty in clearing programs or finding affiliates. The advent of Fox, UPN, and WB demonstrate that nascent networks do not need to option time. The networks simply need to provide programming which will attract affiliates and keep those affiliates satisfied by airing programs that attract viewers.

Nor does the Commission provide any basis for claiming that, absent the ability to option time, networks will not provide original and innovative programming. Innovative network television programs such as "All in the Family", "Hill Street Blues", and "NYPD Blue" demonstrate networks are willing to take creative risks in devising new and bold programming. None of these shows required the optioning of time to succeed. If anything, the networks probably face more restrictions in creativity from the fact that they broadcast over-the-air and self-censor their programming (i.e., eliminating extreme violence, nudity, adult language) than from their inability to clear their programming with affiliates.

Nor does any solid evidence exist of a problem for networks in clearing their programming. As noted earlier in these comments, network clearances of programming are at their highest levels ever, approaching 98 percent. The Office of Advocacy fails to understand why the Commission would modify this rule to obtain that extra 2 percent clearance.

Even if the Office of Advocacy assumes that the Commission has a valid rationale for ensuring that the networks obtain 100 percent clearance[10] and thus have a reason to option time, the proposed solution, providing notice to affiliates that the time will not be used, is inadequate. The Commission's solution simply does not account for the process by which broadcast stations acquire programming.

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[10] Such a rationale would dramatically depart from numerous statements of the Commission that diversity of programming is critical to its role in regulating the networks. Departures from long-held agency interpretations must be explained adequately. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co., 463 U.S. 29, 57 (1983). The NPRM is devoid of any such explanation or evidence to support the need to change that basic principle.

Most television stations affiliate with networks because the networks will provide them with programming throughout the schedule day. This alleviates the burden for television stations to make individual contractual decisions about programming and conduct separate negotiations for each program that airs. While the great percentage of stations utilize the networks for this process, television stations are required to make individual programming decisions for those times in which the networks do not supply programming or for which the station wishes to obtain alternative programming.

The production and sale of individual shows to television stations is called syndication. Given the costs and risks associated with the production of entertainment programming,[11] producers will not film shows unless they have reasonable expectation that they will be able to recoup their production costs and obtain a profit. Most producers for the syndication market convene in late winter at the National Association of Television Programming Executives (NATPE) convention. The convention is less an annual meeting and more a marketplace for syndicated television production. Producers will film a pilot, and if a sufficient number of stations agree to purchase the show

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[11] A one-hour action series might cost anywhere from $500,000 to $1,000,000 per hour to produce. If a minimum of thirteen episodes are needed to achieve a sale in the syndication market, then a producer must be able to recoup in sales anywhere from $6 to $13 million. Often television programmers wish to have a larger number of episodes so the risks are even greater.

for broadcast, full-scale production will commence sometime later that spring for a fall television debut. Thus, product to be made available for syndication and, if needed replacement of rejected network programming occurs some seven months before that programming is actually required.

Now assume for the moment that the Commission permits the optioning of time. A network goes to its affiliate in early February (before NATPE) and says that it wishes to option time on Mondays at 8 p.m. in the fall. If the network decides in August not to use the time, it is unlikely that the affiliate will be able to find alternative programming at that late date. Even if there are syndicated programs available, they may have been purchased by other stations in the same community for broadcast. Nor would the station be able to go back to a producer for a program that did not garner sufficient interest at NATPE to commence production. While the affiliate may be able to fill the time slot, clearly it would not have much choice, if any, in obtaining programming to fill the network vacated slot. Thus, the network would have to provide notice at least six months prior to abandonment of the option for the affiliate to have a meaningful opportunity to obtain alternate programming. The Office of Advocacy does not see what benefit, if any, accrues to the network of optioning time that far into future, especially when most networks have not even made decisions concerning their fall programming.[12] Since no benefit accrues to the network and affiliates could find it extraordinarily difficult to replace the programming, the Office of Advocacy opines that the Commission should abandon the effort to eliminate the "time option" rule.

VI. *Exclusive Affiliation Rule*

The Commission proposes to eliminate the exclusive affiliation rule in large markets because they have sufficient alternative broadcast television stations that consumers would not be denied the opportunity to see another network's programming. On the other hand, the Commission will keep the rule in smaller markets, i.e., those markets in which insufficient stations exist to ensure that programming desired by the community will be available.

Elimination of the exclusive affiliation rule runs into the same conundrum plaguing the "right to reject" rule. Networks

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[12] Networks are in a different position when it comes to the production of replacement shows. Networks enter into a new television season with the expectation that shows may fail and will need to be replaced. The networks have the resources to contract with program producers to commence production of replacement shows (which if not needed during the season can be broadcast during the summer instead of showing reruns). For example, CBS this season has already cancelled one show but had a contract with WB productions for another show that was already in production. Individual affiliates have neither the resources nor the contacts in the production arena to undertake such efforts to fill in gaps created by the late abandonment of option time.

could dictate, albeit to lesser extent than with the right to reject rule, what programs are viewed on an affiliate. An affiliate may believe that the program of another network is more vital to the public interest of the community than the program it had originally scheduled to air. If the program is not being made available to that community (i.e., the other network's affiliate rejected the program), then another network's affiliate should have the opportunity to step in and broadcast the program. Otherwise, the Commission, through regulatory action, will have prevented the dissemination of information vital to that community. The anomalous result turns the concept of public interest, convenience and necessity on its head. Repeal of the exclusive affiliation rule is not in the public interest, irrespective of the market size and should be retained.

VII. *Territorial Exclusivity and Dual Networks*

The Commission proposes reforming the territorial exclusivity rule by modifying the definition of community for purposes of determining the area covered by the exclusivity arrangement. The Office of Advocacy believes that appropriate modification of the definition, possibly to encompass the area of dominant influence, needs to be considered in light of the potential problems that may create for smaller network affiliates within the confines of a larger area. For example, a station built thirty years ago in San Jose might have been seen as a separate market from San Francisco. Today, they might be considered one market (due to growth in the area and living patterns) in which the San Jose station could be affiliated with the same network as the San Francisco licensee. As long as these small stations are protected, such as grandfathering their network affiliation agreements, the Office of Advocacy would not object to a modified definition of the territory for which the broadcaster is the network affiliate.

The Office of Advocacy also believes that the dual network restriction needs to be examined in light of technological change. Advances in technology will require that television stations carry dual signals in order to implement an advanced television system. If the network can only provide one network, then technology is being underutilized or the affiliate must obtain programming for the companion channel from a different source. On the one hand, this could increase program diversity (by giving the impetus to create more new networks). On the other hand, it may be too costly for the affiliate, outside of network provision, to provide new programming for the channel. The Office of Advocacy is not sure what the best balance should be but urges the Commission to analyze carefully the potential for market abuse that might occur if networks provided more than one channel of programming service.[13]

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[13] In a similar circumstance, Congress voted to ensure that wireless cable operators and other non-vertically integrated (continued...)

VIII. *Conclusion*

The Commission recognized the significance that repeal or modification of these rules might have on small television stations affiliated with one of the networks when it prepared a regulatory flexibility analysis. The Office of Advocacy concurs with the Commission that these changes might adversely effect a significant number of small television stations. However, the Office of Advocacy parts company with the Commission in the proposed solution. The Office of Advocacy strongly endorses the need to retain without modification, the right to reject rule, the time option rule, and the exclusive affiliation rule. The Commission should give serious thought to undertaking a further investigation and analysis of the territorial exclusivity and dual network rules. In both instances, the Commission should pay careful attention to the concerns of small broadcasters.

Respectfully submitted,

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[13](...continued)
cable operators had access to programming controlled by large vertically integrated cable operators.